employer for the same racially hostile work environment. *Dennis v. Elixir*, Case Number CV501-84. In that case, the same district court refused to grant the defendant's motion for summary judgment where the only difference was that the employee in that case had obtained a copy of the EEOC file which contained reference to the racially hostile work environment. Indeed, the plaintiff in that case and the petitioner herein filed their lawsuits pro se at the same time, and so it is not surprising that the respondent in support of its Motion for Summary Judgment could not present evidence that the EEOC did not investigate claims of a racially hostile work environment.

Unfortunately, however, the Eleventh Circuit's second opinion does not address that case. The Petitioner herein seeks a hearing before this Court so that this issue can be properly addressed. That is, if a pro se plaintiff did indeed submit evidence of other discriminatory acts by an employer in writing and orally to the EEOC, should the District Court focus solely on the charge form or consider the additional evidence? The trial court in this case was inconsistent in its rulings, and the Eleventh Circuit ignores this issue. The petitioner herein has been unable to present his claim of racial harassment to the jury solely because of the language contained on a charge form prepared by the EEOC and not by him.

Justice is never served by an unrelenting reliance of form over substance. If a civil rights complainant is able to submit evidence that the various claims of racial harassment and racial termination were presented to the EEOC, then the purpose of the filing requirement with the EEOC has been served, that is,

the EEOC has had an opportunity to investigate. It does not appear that any of the circuit courts have specifically addressed this issue with pro se claims filed with the EEOC. This is an important issue which begs to be addressed by this Court. The resulting injustice to the petitioner herein is fully illustrated when the two opinions issued by the Eleventh Circuit in this case are properly compared and considered.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 04-12973
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FREDDY GREEN,
Plaintiff-Appellant,

Versus

ELIXIR INDUSTRIES, INC.,
Defendant-Appellee.

April 29, 2005, Decided

April 29, 2005, Filed

NOTICE: THIS OPINION WAS WITHDRAWN BY THE COURT.

COUNSEL: For Green, Freddy, Appellant: Bower, Bryant H. Jr., Bower Law Office, Waycross, GA; Blacknall, Willis H. III, Thomas, Blacknall & Johnson, Waycross, GA.

For Elixir Industries, Appellee: Hall, J. Ellsworth IV, Hall, Block, Garland & Meyer, Macon, GA.

JUDGES: Before BARKETT, HILL and FARRIS *, Circuit Judges. HILL, Circuit Judge, dissenting.

OPINION BY: FARRIS

OPINION: FARRIS, Circuit Judge:

In this appeal we decide whether a claim for hostile work environment discrimination was adequately stated to the EEOC and met the summary judgment standard. It was, and it did. We therefore reverse and remand for further proceedings.

BACKGROUND

Plaintiff Freddy Green is a black male who was employed by Defendant Elixir Industries, Inc. in 1995 in its second shift paint line at Elixir's Georgia Extrusion Division in Douglas, Georgia. Elixir produces extruded and manufactured aluminum parts for manufactured housing and recreational vehicle industry supplies. Elixir's employees work on two shifts of varying hours. Green's primary duties when he was first hired were to hang metal that was to be painted. After 90 days, Green was transferred at his request to the second shift fabrication department. His duties then included operating a miter saw, running presses and drills, and ensuring the proper preparation of dyes. On August 7, 2000, Green was transferred to the first shift fabrication department as part of a reduction in force which terminated almost all second shift employees.

In each job classification (including the paint department and fabrication department) an employee would receive pay raises at three-month, nine-month, and one-year intervals. After one year, an employee was only eligible for merit-based pay raises, based on a supervisor's recommendation, on the anniversary of the start of employment.

Though a person in Green's position normally reached the top wage for his classification after one year of employment, Green did not. He complained to his supervisor, Stanley Wilcox, a black male, that he was receiving only $ 8.37 per hour, while white and Hispanic employees were receiving $ 9.01 per hour. Wilcox did not respond to the complaint but after Green complained to a white supervisor his wage was increased to $ 9.01. Green never received any merit increases thereafter.

Green alleges that, throughout his employment at Elixir, he was subjected to repeated and intense acts of racially motivated harassment. At some time in 1998, a hangman's noose was hung on equipment in the fabrication department and remained there for approximately a week. On April 19, 2000, Clay Hutchinson, a white employee, made a noose and displayed it, allegedly in an attempt to intimidate Wilcox. Hutchinson was allegedly angry because Wilcox was involved romantically in an interracial relationship with a woman in whom Hutchinson was interested. Several Elixir employees expressed disdain for interracial relationships, and Charles Hutchinson, Clay's brother, is alleged to have told Green that race mixing is "against the Bible." Green's common law spouse is white.

On May 26, 2000, Green alleges that a third noose appeared. This noose was made by Jack Dixon, a white employee and the nephew of the production manager at Elixir, Jacel Butler. Mr. Dixon allegedly made the noose because he was upset at the possibility that the Confederate battle emblem would be removed from the Georgia state flag. Green observed Dixon make the

noose and heard him say, "How would y'all like it if we sent all of y'all back to Africa?" and "If y'all take the flag down, all of y'all need to be sent back to Africa." Green complained about this incident to Wilcox, who stated that he could do nothing about it.

On another occasion, Green observed a number of white employees looking at a computer screen that displayed a Ku Klux Klan website and overheard these employees discussing that a number of Elixir employees were members of various chapters of the KKK. Green complained about this incident to Wilcox and to Steve Parks, a white management level employee, who stated that he would look into the matter. According to Green, nothing occurred thereafter.

At a meeting of second shift workers (almost all of whom were black), production manager Jacel Butler is alleged to have stated, "I can take a monkey and give him a banana to push a button," and "If y'all don't want to work, I can go to Cozy Corner and get drunks to replace you." Green testified that Cozy Corner is a local black club. After this meeting, a sign was placed in an office window visible to all employees that stated, "Please don't feed the monkeys."

According to the testimony of Dwight Dennis, a former black employee at Elixir who also filed a lawsuit against Elixir for hostile work environment race discrimination at roughly the same time as this action, production manager Butler issued a rule that no family members would be allowed inside the plant. Dennis testified that the rule was not enforced in the first shift, which was

composed of mostly white employees. On the second shift, however, the rule was rigorously enforced.

There is also evidence that at several points in his employment, Green was disciplined for attendance policy violations. On three occasions, he was suspended for three days without pay for failing to report for work.

During the week of Christmas, Elixir often closed the plant and operated with only a skeleton crew. Employees were given the choice to work with the skeleton crew if they wished. In 2000, the plant closed from December 26-29, and Green did not work on those days. During that time, Green and his wife were shopping in a local store and were seen by production manager Butler. Green testified that when Butler saw him and his wife together, Butler took "his buggy and push[ed] [it] back down the aisle and [stood] there and stare[d] at us, just looking out like he was losing his mind."

On January 2, 2001, Green returned to work. After working for six hours, he was approached by Butler, who told him that he was fired. Butler's reason was that Green had volunteered to work from December 26-28 with the skeleton crew and had failed to call in to state that he would not come. Green contends that his name was not posted to work on those days, that he never volunteered, and that no one let him know that he was expected to work on those days.

On March 28, 2001, Green filed pro se a charge of discrimination with the EEOC. Green checked the box stating that the discrimination alleged was racial. In the

box where Green was required to state the dates of the discrimination, Green wrote "January 2, 2001" as the "earliest" and "latest" dates. In the factual particulars section, Green stated:

> I. I was employed from March 7, 1995 until my discharge January 2, 2001. I was terminated for violation of the attendance policy, but I have no written warnings for attendance. White males that have written warnings and have committed further violations were not terminated.
>
> II. Management stated I was discharged because of violation of the attendance policy.
>
> III. I believe that I have been discriminated against because of my race (black) in violation of Title VII of the Civil Rights Act of 1964, as amended.

The EEOC investigated Green's charges and concluded that Green was not terminated because of his race. It issued Green a right to sue notice. Green subsequently filed this action.

Green brought claims for violation of his rights pursuant to 42 U.S.C. § 2000(e) (Title VII) and 42 U.S.C. § 1981, for both wrongful termination on the basis of race and hostile work environment race discrimination. Defendant moved for summary judgment, and the district court denied the motion as to the wrongful termination claim. That claim was tried to a jury, which returned a verdict for the defendant. The

district court found the evidence sufficient to withstand summary judgment on the hostile work environment claim,[1] but accepted the defendant's argument that the EEOC charge was procedurally deficient as to this claim. The court gave Green fifteen days to respond to defendant's argument.

Green filed a brief and affidavit in response. In the affidavit, Green stated that he spoke to an EEOC investigator and told him about the harassing conduct. He also testified that he provided paperwork to the EEOC detailing these incidents and that he believed that the incidents of harassment would be included in his EEOC charge. Green's counsel stated that he attempted to obtain Green's file from the EEOC, but was advised by the EEOC that the file had been destroyed. The district court rejected Green's arguments and entered summary judgment on the hostile work environment claim for defendant.

Green filed a motion for reconsideration of this ruling. He called attention to a companion case, *Dennis v. Elixir*, No. CV501-84, in which Green's colleague, Dwight Dennis, had filed a pro se complaint of racial harassment against Elixir, in the same court and before the same judge. Elixir raised precisely the same issue in *Dennis*, arguing that an alleged procedural deficiency in the EEOC charge with respect to allegations of workplace harassment barred the claim. Dennis, however, was able to obtain and produce written documents that he presented a hostile work environment claim to the EEOC (though not on the charge itself) before the agency destroyed his file. The district court distinguished Green's situation, calling Green's affidavit "self-serving" and noting that Green

had been unable to produce any paperwork from the EEOC. The court denied the motion for reconsideration.

STANDARD OF REVIEW

We review the grant of summary judgment de novo. *Higdon v. Jackson*, 393 F.3d 1211, 1218 (11th Cir. 2004).

ANALYSIS

The issue is whether, in the face of evidence of hostile work environment discrimination, the fact that Green's EEOC charge did not contain specific allegations of hostile work environment discrimination bars that claim.

"Prior to filing a Title VII action . . . a plaintiff first must file a charge of discrimination with the EEOC." *Gregory v. Georgia Dep't of Human Resources*, 355 F.3d 1277, 1279 (11th Cir. 2004). The purpose of this requirement is that the EEOC "should have the first opportunity to investigate the alleged discriminatory practices to permit it to perform its role in obtaining voluntary compliance and promoting conciliation efforts." *Id.* Equally important, the charge requirement serves to notify the employer of the allegations made against it. *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1319 (11th Cir. 2001). These policy concerns have moved us to hold that a plaintiff's complaint is "limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Gregory*, 355 F.3d at 1280 (internal citation omitted). Nevertheless, courts must be "extremely reluctant to allow procedural technicalities

to bar claims brought under [Title VII]." *Id.*; *see Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 461-62 (5th Cir. 1970) (emphasizing the "humanitarian underpinnings of Title VII and the crucial role played by the private litigant in the statutory scheme").

There is no dispute that the three statements in Green's EEOC charge emphasize Green's termination as the central discriminatory act. The charge also lists January 2, 2001, as the starting and ending date of the discriminatory conduct. However, this does not necessarily bar Green's hostile work environment claim. In *Sanchez*, a case on which both parties rely, we rejected the defendant-employer's arguments that the plaintiff's claims based on national origin discrimination were barred because she checked the box on the EEOC charge marked "sex" rather than "national origin." 431 F.2d at 461. We stated: "In the context of a statute like Title VII it is inconceivable that a charging party's rights should be cut off merely because he fails to articulate correctly the legal conclusion emanating from his factual allegations." Likewise, the fact that Green responded on the charge with a single date when asked when the discrimination occurred does not mean that his harassment claims are barred. Knowing which acts constitute discriminatory conduct and which are offensive and harassing, but not per se actionable, requires legal training, which Green did not possess. *Sanchez's* reasoning applies with equal force here.

Defendant attempts to distinguish *Sanchez* by pointing out that the facts set forth by Green in the charge did not give Elixir notice that he intended to bring a hostile work environment claim. This, however, is very much akin to the argument made by the *Sanchez* defendant:

"Certainly it is not unreasonable to require a charging party promptly to articulate the reason why he thinks he is being treated unfairly by an employer." *Id.* at 462. We rejected this argument for three reasons, all of which are relevant here:

First, the charging party may have precise knowledge of the facts concerning the 'unfair thing' done to him, yet not be fully aware of the employer's motivation for perpetrating the 'unfair thing.' Secondly, the charging party may be so unlettered and inarticulate that he does not fully comprehend the distinction between an act motivated by 'sex discrimination' and an identical act motivated by 'national origin discrimination.' Finally, the charging party may simply be unschooled and unsophisticated in the use of forms. Should a charging party forfeit his cause of action for reasons such as these? We think not.

Id. at 462-63. Whatever Green's level of education, there is no question that he should not be held to the level of understanding the distinctive legal nuances between claims that constitute hostile work environment discrimination and those instead which constitute wrongful termination based on race. Like Ms. Sanchez, Green filed his charge of discrimination pro se. Green even stated, in a distinct factual allegation, that he was "discriminated against because of [his] race." This allegation contains no reference to his termination; it is simply an unqualified statement, standing alone, of race discrimination. "It would falsify [Title VII's] hopes to require verbal precision and finesse from those to be protected . . . ." *Sanchez*, 431 F.2d at 465.

Our recent holding in *Gregory v. Georgia Dep't of Human Resources*, 355 F.3d 1277 (11th Cir. 2004) is of some assistance. There, plaintiff Gregory, a physician, alleged that she had been terminated for "no legitimate reason." She marked the spaces on the charge for "gender and race discrimination" and left the "retaliation" space blank. She also stated that she "believe[d] that [she] had been discriminated against on the basis of my race (Black American) and my sex (female)." *Id.* at 1279.

After receiving her right to sue notice from the EEOC, Gregory asserted in her complaint that her termination was motivated by her race and was in retaliation for her complaints about her supervisor's conduct. *Id.* Defendant argued that her allegations of retaliation were administratively barred because she had only alleged race discrimination in her EEOC charge. The district court disagreed and we affirmed:

> After a careful *de novo* reading of Dr. Gregory's EEOC charge prepared without the assistance of counsel, and under the liberal EEOC charge strictures of *Sanchez*, we hold that the district court did not err in finding that Dr. Gregory's retaliation claim was not administratively barred by her failure to mark the retaliation space on the EEOC template form. The facts alleged in her EEOC charge could have reasonably been extended to encompass a claim for retaliation because they were inextricably intertwined with her complaints of race and sex discrimination. That is, she stated facts from which a reasonable EEOC investigator could have concluded that what she had complained about is retaliation.

Id. at 1280. The proper inquiry, as these cases make clear, is whether the complaint is "like or related to, or grew out of" the allegations in the EEOC charge. *Id.*

That the facts involving Green's harassment and termination claims are "inextricably intertwined" has already been established. At trial on his wrongful termination claim, Green was permitted to introduce evidence of racial harassment while at Elixir, including evidence of the three hangman's nooses. The reason that such evidence was permitted, plainly, is that it was relevant to his allegation of wrongful termination. Thus, if that evidence was relevant to, or related to, his case at trial, it should likewise be "related to" or "like" the evidence and allegations of harassment.

The policies supporting the EEOC charge requirement support this conclusion as well. One of the primary purposes for the charge requirement is to provide notice to the employer of the allegations against it. *Wilkerson*, 270 F.3d at 1319. Here, the evidence of racial harassment, if believed (as it must be on summary judgment review), is so substantial that Elixir should already have been on notice of the problems at its plant. Many of Green's allegations directly involve management-level employees at Elixir. Elixir had, or should have had, ample notice of the racially hostile working conditions at its plant. It is disingenuous for Elixir to plead ignorance because Green did not include each specific act of harassment on his EEOC charge.

Defendant relies heavily on *Tart v. Hill Behan Lumber Co.*, 31 F.3d 668 (8th Cir. 1994), but that case can be distinguished in a way that demonstrates the fallacy of

defendant's argument. In *Tart*, an employee stated on her administrative form that she had been wrongfully terminated. In her complaint, however, she included allegations that she had been racially harassed, and the court held that her harassment allegations were barred. *Id.* at 672-73. Crucial to the Eighth Circuit's ruling, however, was the following conclusion:

> In this case, the record demonstrates that Patrick Behan was solely responsible for the decision to terminate Tart, and Tart's discriminatory discharge claim turned upon the subjective motivation of Patrick Behan. The incidents of alleged racial harassment by coworkers are distinct from and unrelated to the . . . incident which resulted in . . . [the] decision to discharge Tart . . . . *Furthermore, the conduct of co-employees throughout Tart's 11-year employment with [defendant] offers little if any insight into Patrick Behan's motivation for terminating Tart . . . . We therefore conclude that Tart's racial harassment claim is not sufficiently like or related to his complaint of discriminatory discharge . . . .*

Id. (emphasis supplied).

Here, by sharp contrast, the individual responsible for terminating Green, Jacel Butler, was intimately familiar with the allegedly harassing conduct complained of by Green. In fact, he was allegedly responsible for much of that conduct himself. The evidence supporting Green's hostile work environment and wrongful termination claims is "inextricably intertwined," *Gregory*, 355 F.3d at 1280, in that the

same man is in large measure allegedly responsible for both. Faced with these facts, a reasonable EEOC investigator could have concluded that Green's complaints involved allegations of racial harassment. *See id.*

We take no position on the merits of Green's claim of hostile work environment race discrimination. That is for the trier of fact to determine. We merely hold that, on this record, Green stated enough on his EEOC charge to warrant an investigation of hostile work environment discrimination at Elixir. We also hold that Green has raised a genuine issue of material fact with respect to this claim, which precludes summary judgment for the defendant. It is inconsistent with Title VII's expansive remedial aims to prevent Green's racial harassment claim from proceeding to trial because Green's statements on an administrative form might have been more exhaustive.[2]

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

n1 The court granted summary judgment for defendant on Green's claim for punitive damages as to the hostile work environment claim. That issue has not been appealed.

n2 Green also appears to argue that he should be permitted to "retry the case as a whole with the claim of racial harassment included therein." We reject this claim. The jury found for defendant on the wrongful

termination claim. Judgment on that verdict has not been appealed.

REVERSED AND REMANDED.

DISSENT BY: HILL

DISSENT: HILL, Circuit Judge, dissenting:

Today, the majority holds that a plaintiff's failure to allege facts sufficient to inform the EEOC that he complained of hostile work environment as well as wrongful termination is a "procedural technicality" that cannot be allowed to bar a subsequent Title VII claim. Although conceding that Green's EEOC charge does not allege a single *fact* that reasonably could have been expected to prompt the EEOC to investigate a charge of hostile work environment,[1] the majority characterizes this as a failure to articulate a correct legal conclusion emanating from his factual allegations, and then excuses this failure as the result of Green's lack of legal training. Respectfully, I cannot concur in this characterization of the record in this case.

Furthermore, I cannot concur in the majority's conclusion that Green's assertion that he was "discriminated against because of [his] race," constitutes a factual allegation sufficient to support hostile work environment claim. Such an allegation, then, by itself, and without more, would support any conceivable judicial discrimination claim and render the requirement to exhaust ones claims in the EEOC totally irrelevant.

We have indeed traveled a long way down the road that permits us to liberally construe the factual allegations of a plaintiff's EEOC charge in determining what claims were fairly raised there. But I am unaware of any case that, heretofore, permitted us to conclude that a claim was fairly raised in the absence of a single factual allegation that would support such an inference. Therefore, I must respectfully dissent.[2]

Footnotes

n1 Green's charge complained only of his termination. Additionally, he defined the relevant time period of the discriminatory conduct as the single day on which he was fired.

n2 In *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, relied upon by our panel here, the failure of the employee to present to the EEOC a full statement of his complaint is referred to on each and every page of the decision (Parts II, III, IV and V) as a "technicality." Perhaps my view is informed by my own experience as a young (what a memory!) lawyer, complaining that the point advanced against my position by opposing counsel was "a mere technicality." The very fine judge presiding looked at me, kindly but positively, and said, "Mr. Hill, a technicality is a point of law upon which you lose. If you win on it, it is a cornerstone of American jurisprudence!"

No. 04-12973

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
FREDDY GREEN,

Plaintiff-Appellant,

versus

ELIXIR INDUSTRIES, INC.,
Defendant-Appellee.

October 11, 2005, Decided

October 11, 2005, Filed

NOTICE: NOT FOR PUBLICATION

COUNSEL: For Freddy Green, Appellant: Bryant H. Bower, Jr., Bower Law Office, WAYCROSS, GA; Willis H. Blacknall, III, Thomas, Blackwall & Thomas, WAYCROSS, GA.

For Elixir Industries, Appellee: J. Ellsworth Hall, IV, Hall, Block, Garland & Meyer, MACON, GA.

JUDGES: Before BARKETT, HILL and FARRIS * , Circuit Judges.

OPINION: Before BARKETT, HILL and FARRIS*, Circuit Judges.

PER CURIAM:

We withdraw our previous opinion and substitute this opinion in its place.

Freddy Green appeals the district court's grant of summary judgment in favor of Elixir Industries on his race employment discrimination claim. Green filed suit in district court alleging wrongful termination on the basis of race, as well as racial hostile work environment discrimination, in violation of 42 U.S.C. § 2000e et seq. (Title VII) and 42 U.S.C. § 1981. n1 Although the district court found the merits of Green's hostile work environment claim sufficient to withstand summary judgment, the court nonetheless granted summary judgment on that claim under both Title VII and § 1981, on the grounds that the Equal Employment Opportunity Commission ("EEOC") charge Green had filed was deficient.

We affirm the district court's determination that Green's EEOC charge was insufficient to provide notice of a Title VII hostile work environment claim. While § 1981 does not require a plaintiff to exhaust administrative remedies by filing an EEOC charge, Green has abandoned any argument concerning his § 1981 claims, because he failed to raise them on appeal. Accordingly, we affirm.

BACKGROUND

Plaintiff Freddy Green is a black male who was employed by Defendant Elixir Industries, Inc. at its Georgia Extrusion Division in Douglas, Georgia from March 1995 until he was terminated on January 2, 2001. Following his termination, Green filed a pro se charge of discrimination with the EEOC. Green checked the

box stating that the discrimination alleged was racial. In the box where Green was required to state the dates of the discrimination, Green wrote "January 2, 2001" as the "earliest" and "latest" dates. In the factual particulars section, Green stated:

> I.I was employed from March 7, 1995 until my discharge January 2, 2001. I was terminated for violation of the attendance policy, but I have no written warnings for attendance. White males that have written warnings and have committed further violations were not terminated.
>
> II. Management stated I was discharged because of violation of the attendance policy.
>
> III. I believe that I have been discriminated against because of my race (black) in violation of Title VII of the Civil Rights Act of 1964, as amended.

The EEOC investigated Green's charges and concluded that Green was not terminated because of his race.[2] It issued Green a right to sue letter.

Green subsequently filed this action, which alleged both racial hostile environment discrimination and racially-motivated termination in violation of Title VII and § 1981. Green's allegations in the suit include repeated and outrageous acts of racially motivated harassment.

Elixir filed a motion for summary judgment, asserting that Green's EEOC charge did not contain specific allegations of a hostile work environment, but only mentioned his termination as the discriminatory act,

and listed January 2, 2001, as both the starting and ending date of the discriminatory conduct. Elixir claimed that a hostile work environment investigation could not reasonably be expected to grow out of this charge, and that Green's Title VII claim was therefore procedurally deficient. The district court found that Green's EEOC charge was deficient and granted summary judgment solely on that basis.

DISCUSSION

We review the grant of summary judgment de novo. *Higdon v. Jackson*, 393 F.3d 1211, 1218 (11th Cir. 2004). Before filing a Title VII action, a plaintiff must exhaust his administrative remedies by filing a charge of discrimination with the EEOC. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460 (5th Cir. 1970). [3] Though we must liberally construe EEOC charges that are prepared without the assistance of counsel, a plaintiff's civil complaint remains "limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Gregory v. Ga. Dep't of Human Res.*, 355 F.3d 1277, 1280 (11th Cir. 2004) (quoting *Alexander v. Fulton County*, 207 F.3d 1303, 1332 (11th Cir. 2000).

Though Green relies on Gregory to argue that his EEOC charge embraced a hostile environment claim, we find Gregory inapposite. In Gregory, though the plaintiff failed to check the box labeled "retaliation" on the EEOC charge, the charge nonetheless alleged facts that reasonably encompassed a claim for retaliation. *Gregory*, 355 F.3d at 1280. By contrast, all of the factual allegations contained in Green's EEOC charge relate to his termination and none relate to a retaliation

claim. He noted the date of his termination as both the earliest and latest date of discriminatory conduct; explained that his termination ostensibly stemmed from attendance policy violations; and stated that white males with inferior attendance records were retained. Nothing in Green's EEOC charge related to incidents of harassment, nor did anything mention the dates on which they occurred. Because the facts alleged in Green's EEOC charge form cannot be said to encompass a hostile work environment claim, we affirm the district court's finding that his claim was therefore procedurally deficient. See *Sanchez*, 431 F.2d at 466 (explaining that a Title VII complaint may encompass only the kinds of discrimination like or related to the allegations contained in the EEOC charge).

Unlike Title VII, § 1981 does not require that a plaintiff exhaust administrative remedies before filing an action in federal court. See *Caldwell v. Nat'l Brewing Co.*, 443 F.2d 1044, 1046 (5th Cir. 1971) (holding that a plaintiff alleging discriminatory employment practices with regard to race "has an independent remedy under § 1981 without respect to exhaustion Under Title VII"). As such, a hostile work environment claim brought under § 1981 cannot be defeated by a deficient EEOC charge. Thus, while the district court improperly entered summary judgment on Green's § 1981 claim based on his failure to exhaust administrative remedies, circuit precedent dictates that Green's failure to raise his § 1981 claim on appeal renders the issue abandoned. See *United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001) (applying "our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned").

AFFIRMED.

Footnotes

* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

n1 The wrongful termination claim went to trial, and the jury returned a verdict for Elixir Industries.

n2 Green claims that he told an EEOC investigator about the harassing conduct and provided paperwork to the EEOC substantiating the incidents concerning his hostile-environment claim. The EEOC has since destroyed Green's file. However, there is no dispute concerning Green's EEOC charge form, which did not include facts concerning his hostile-environment claim.

n3 In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

Filed 8/15/2003
CIVIL CV 501-83

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA
WAYCROSS DIVISION

FREDDY GREEN, Plaintiff,

VS.

FLIER INDUSTRIES, INC., Defendant.

ORDER

Before the Court is Defendant's Motion for Summary Judgment. (Doc. 24). After careful consideration, the Court finds that Defendant's motion for summary judgment should be GRANTED IN PART AND DENIED IN PART.

BACKGROUND[1]

Plaintiff, an African-American male, was formerly employed by Defendant at its Georgia Extrusion Division in Douglas, Georgia, from March 7, 1995, until his termination on January 2, 2001.

Defendant is a California corporation licensed to do business in Georgia. It produces extruded and manufactured aluminum parts to customer specifications mainly for manufactured housing and recreational vehicle industry supplies. Defendant's employees work on two shifts that range from eight to twelve hours in duration depending on customer

backlog.

Plaintiff began his employment with Defendant in 1995 in the second shift paint line. Plaintiff's job duties at that time consisted chiefly of hanging metal that was going to be painted. After 90 days, Plaintiff was transferred, upon his request, to the second shift fabrication department. Plaintiff's job duties then consisted of operating a miter saw and running presses and drills. Plaintiff also performed the duties of a die set-up man. This task involved ensuring the proper preparation of dies. On August 7, 2000, Plaintiff was transferred to the first shift fabrication department as part of a reduction in force, which terminated the employment of almost all of the second shift employees. Plaintiff remained in the first shift fabrication department until his termination.

Plaintiff's transfer from the paint department to the fabrication department involved a change in job classification, which entitled Plaintiff to a higher rate of pay. In each job classification, an employee would receive pay raises after three months, nine months, and one year of continued employment. At one year, each employee was to reach the maximum wage rate f or that job classification. once the maximum wage rate was reached, an employee was eligible for only merit based pay raises on the anniversary of the start date of employment. Merit raises were based solely on the recommendation of the employee's supervisor.

While Plaintiff should have reached the maximum wage rate for his classification after only one year of employment, he did not. Plaintiff complained to his supervisor, Stanley Wilcox, an African American male,

that he was not receiving pay raises, but Plaintiff's complaints to Mr. Wilcox were unavailing. Jacel Butler, the Production Manager at the plant, told Plaintiff that his overtime pay would make up for not getting the raise. (Pl. Depo. at P. 28). According to Plaintiff, white and Mexican employees received $9.41 per hour, while Plaintiff received only $8.37 per hour. In the middle of the year 2444, Plaintiff began to receive the maximum wage rate of $9.41 per hour. This raise was obtained when Plaintiff complained to a white supervisor. (Pl. Depo. at p. 105). After he reached the maximum wage rate, Plaintiff did not receive any merit increases.

Throughout Plaintiff's employment with Defendant, a number of troubling incidents occurred. First, in 1998, a hangman's noose was hung on the equipment in the fabrication department and remained there for approximately one week. (P1. Depo. at pp. 38--40). The source of this noose and the motivation for its display are unknown. A second hangman's noose appeared on April 19, 2000. This noose was made by Clay Hutchinson,2 a white employee, apparently to intimidate Mr. Wilcox. (Id. at pp. 42-43). Mr. Hutchinson's alleged motivation was that Mr. Wilcox was dating a white female, whom Mr. Hutchinson was also interested in romantically.

Interracial relationships were viewed unfavorably by some employees at the plant. Charles Hutchinson, another white employee and Clay Hutchinson's brother, told Plaintiff that race mixing was against the Bible. (Id. at p. 43). Plaintiff is himself involved in an interracial relationship, as his common law wife is white.

A third noose appeared on May 26, 2000. This noose was allegedly made by Jack Dixon,[3] a white employee, and was hung on a forklift for a while, driven around, and then laid on a desk. Mr. Dixon allegedly made the noose out, of his dissatisfaction with the possible removal of the Confederate battle emblem from the Georgia state flag. Plaintiff observed Mr. Dixon make the noose and heard him make comments such as "How would y'all like it if we sent all of y'all back to Africa?" and "If y'all take the flag down, all of y'all need to be sent back to Africa." (Id. at p. 45). Plaintiff complained about this incident and the April 19 noose to his supervisor, Mr. Wilcox. Mr. Wilcox replied to Plaintiff's complaints by stating that his hands were tied. (Id. at p. 47).

On another occasion, Plaintiff observed a number of white employees looking at a computer screen that displayed a Ku Klux Klan ("KKK") website and overheard these employees discussing how many members were in different chapters of the KKK. (Id. at pp. 76, 78). Plaintiff complained about this incident to Mr. Wilcox, and to Steve Parks, a white management level employee. Mr. Parks responded that he would look into the matter. (Id. at pp. 78-79). According to Plaintiff, nothing was ever done about the incident.

In addition, at a meeting of all second shift workers,[4] production manager Jacel Butler made statements such as "I can take a monkey and give him a banana to push a button," and "If y'all don't want to work, I can go to Cozy Corner[5] and get drunks to replace you." (Id. at p. 63). Following the department meeting, a sign was placed in an office window in the plant visible to all employees, which stated: "Please don't feed the

monkeys." (Id. At p. 66). It is unknown who placed the sign there, or who removed it the next morning.

During Plaintiff's employment, a rule was promulgated by the production manager, Mr. Butler, that no family members would be allowed inside the plant. (Dennis Depo. at p. 110). This rule was not implemented during the first shift, which was composed of mostly white employees. (Id. at pp. 114-12). However, on second shift, the rule was strictly enforced. (Pl. Depo. at p. 51). Plaintiff required certain tools to perform his job as die set-up man. At the plant, many tools were kept in a locked cage. According to Plaintiff, the cage contained tools that were necessary for the performance of his work, however, he was denied access to those tools and therefore had to borrow tools from the maintenance department. According to Defendant, however, Plaintiff was not denied access to the tools because of his race, but because he was not a die repairman. Defendant maintains that the tools kept in the locked cage were exclusively for employees who were die repairmen. (Butler Depo. at P. 23).

Upon his acceptance of employment with Defendant, Plaintiff was furnished a copy of Defendant's attendance policy. Plaintiff signed the attendance policy acknowledging his receipt and understanding of it. (Def. Exh. A). The attendance policy provides that discipline for unexcused absences are as follows:

First Violation:	Written warning
Second Violation:	Written warning
Third Violation:	Three-work-day suspension without pay
Fourth Violation:	Termination of employment

(Id.). The attendance policy also provides that employees who are absent for three or more consecutive days without calling in will be considered as having abandoned their job with Defendant.

While working for Defendant, Plaintiff was disciplined for attendance policy violations on several occasions. (Aff. of R. Douglass at Par. 6). On three separate occasions, Plaintiff was disciplined with a three work days suspension without pay for attendance policy violations.[6] (Pl. Depo. at p. 90).

During the week of Christmas, Defendant often shut down the plant. Defendant's employees are not paid during this time unless they choose to use vacation time or volunteer to work. Defendant employs a skeleton crew during the shutdown to perform various maintenance and plant improvement functions. Employees are given the opportunity to work on the skeleton crew if they wish. In December of 2000, the plant was closed from December 26-29.

Plaintiff did not work during the shutdown. During that time, Plaintiff and his wife visited a local Harvey store, where they saw Mr. Butler. According to Plaintiff, when Mr. Butler saw Plaintiff and his Caucasian wife, Mr. Butler "[took] his buggy and pushe[d] back down the aisle and [stood] up there and stare [d] at us, just looking out like he was losing his mind." (Pl. Depo. at p. 110).

On January 2, 2002, Plaintiff returned to work. After working for six hours, he was approached by Mr. Butler, who informed Plaintiff that he was fired. Mr. Butler stated that Plaintiff was fired for failing to

report to work on December 26-28 without calling in. According to Mr. Butler, Plaintiff volunteered to work the skeleton crew during the shutdown. (Butler Depo. at p. 8). Plaintiff, however, maintains that he did not volunteer to work during the shutdown, that no one advised him that he was scheduled to work on those days, and that his name was not posted as being scheduled to work. (Pl. Depo. at P. 33).

On March 28, 2001, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging that he was terminated because of his race. The EEOC issued a Dismissal and Notice of Rights to Plaintiff on July 5, 2001. On September 26, 2001, Plaintiff filed his Complaint in this Court pro se. Plaintiff subsequently retained counsel and filed an Amendment to Complaint on October 25, 2001. Through his Complaint and Amendment to Complaint, Plaintiff asserts that Defendant violated his rights under 42 U.S.C. Sec. 2000(e) and 42 U.S.C. Sec. 1981 by terminating him from employment on the basis of race and because Plaintiff was exposed to a racially hostile work environment and continued racial harassment.[7]

On December 26, 2002, Defendant filed its motion for summary judgment presently before the Court. Plaintiff filed his response on January 27, 2003. Defendant then filed a reply on February 6, 2003.

ANALYSIS

1. Standard of Review

Summary Judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c). The "purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Matsushita Elec. Indus. Co. v. Zenith, Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1340, 1355, 89 L. Ed. 2d 538 (1986) (quoting Fed. R. Civ. P. 56 advisory committee's note). Summary judgment is appropriate when the nonmovant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trials" Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed.265 (1986), Tidmore Oil Co. Gulf Prods. Div., a Div. of HP Oil Co., 932 F.2d 1384, 1387-88 (11th Cir. 1991). The substantive law governing the action determines whether an element is essential. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986); DeLong Equip. Co. v. Washington Mill Abrasive Co., 887 F.2d 1499, 1505 (11th Cir. 1989).

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, if any, which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323, 106 S. Ct. at 2553. The burden then shifts to the nonmovant to establish, by going beyond the pleadings, that there is a

genuine issue as to facts material to the nonmovant's cage. Thompson v. Metropolitan Multi List Inc., 934 F.2d 1566, 1583 n.16 (11th Cir. 1991) ; Chanel Inc. v. Italian Activewear of Fla., Inc., 931 F.2d 1472, 1477 (11th Cir. 1991). A dispute of material fact "is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Liberty Lobby, 477 U.S. at 248, 106 S. Ct. at 2510. However, if the nonmoving party's response to the summary judgment motion consists of nothing more than mere conclusory allegations, then the court must enter summary judgment in the moving party's favor. Pepper v. Coates, 887 F.2d 1493, 1495 (11th Cir. 1989). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, [then] there is no genuine issue for trial." Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356; See Libertv Lobby, 477 U.S. at 252, 106 S. Ct. at 2512; Johns v. Jarrard, 927 F.2d 551, 556 (11th Cir. 1991).

In assessing whether the movant is entitled to summary judgment in its favor, the district court must review the evidence and all reasonable factual inferences arising from it in the light most favorable to the nonmoving party. Welch v. Celotex Corp.,951 F.2d 1235, 1237 (11th Cir. 1992); Ryder Int'l. Corp. v. First Am. Nat'l. Bank, 943 F.2d 1521, 1523 (11th Cir. 1991). The Court must avoid weighing conflicting evidence, Liberty Lobby, 477 U.S. at 255, 106 S. Ct. at 2513; McKenzie v. Davenport-Harris Funeral Home 834 F.2d 930, 934 (11th Cir. 1987). A mere "scintilla" of evidence supporting the opposing party's position, however, will not suffice. See, e.g., Walker v. Darby, 911 F. 2d 1573, 1577 (11th Cir. 1990). Nevertheless, where a reasonable fact finder may "draw more than one inference from the

facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment." Barfield v. Brierton, 883 F.2d 923, 933 34 (11th Cir. 1989)(citation omitted). This is particularly true in employment discrimination cases where questions of motive and intent are difficult to resolve without a trial. Batey v. Stone 24 F.3d 1330, 1336 (11th Cir. 1994) ("This Circuit has long held that the granting of summary judgment in employment discrimination cases . . . is especially questionable.") (citing Hayden v. First National Bank, 595 F.2d 994, 997 (5th Cir. 1979)).

II. Plaintiff's Termination Claim

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., prohibits an employer from refusing to hire, discharging or otherwise discriminating against any individual "because of such individual's race, color, religion, sex or national origin." 42 U.S. C. Sec. 2000e-2 (a) (1994).fn8 In this case, Plaintiff claims that Defendant violated Title VII by discriminating against him based on his race. Specifically, Plaintiff claims that he is African American and that Defendant unlawfully fired him for that reason.

To prove his claims, Plaintiff may present either direct or circumstantial evidence. Direct evidence of discrimination is evidence which is "directly probative of an intent to discriminate." See Young v. Gen. Foods, 840 F.2d 825, 829 (11th Cir. 1988). In other words, direct evidence "is any evidence that proves a fact in question without reliance on inference or presumption." Polote Corp. v. Metric Constructors Inc., 880 F. Supp. 886, 843 (S.D. Ca. 1995). "Only

blatant comments in which it is obvious that the only intent possible is one of discrimination suffices to constitute direct evidence." See Trumbull v. Health Care and Ret. Corp. of Am., 756 F. Supp. 532, 537 (M.D. Fla. 1991), aff'd, 949 F.2d 1162 (11th Cir. 1991). In its brief, Defendant asserts that Plaintiff's evidence is not direct evidence of discrimination. Plaintiff does not disagree.

Without direct evidence, a plaintiff may still prove his claim of discrimination with the three-tiered analysis that the Supreme Court first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). First, the plaintiff must prove by a preponderance of the evidence a prima facie case of discrimination. Id. at 802, 93 S. Ct. at 1824. Second, if the plaintiff satisfies this requirement, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the allegedly discriminatory conduct. Id. Finally, if the defendant meets its burden, the plaintiff must demonstrate by a preponderance of the evidence that the defendant's proffered reasons are not true and are merely pretext for discrimination. Id. at 804, 93 S. Ct. at 1825. "Despite the shifting burdens of proof, the ultimate burden of persuasion remains at all times with the plaintiff." Polote, 880 F. Supp. at 843 (citing Texas-Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093, 67 L. Ed. 2d 207 (1980)). Where the evidence, taken as a whole, is such that a jury could not find that the plaintiff was a victim of discrimination, summary judgment should be granted. Sample v. Schuller Int'l, Inc., 836 F. Supp. 576, 882 (S.D. Ca. 1993).

A. Prima Facie Case

In this case, Plaintiff contends that he was fired as the result of racial discrimination. The parties generally agree that Plaintiff may establish his prima facie case of discriminatory termination by alleging the following: (1) he belongs to a protected class, (2) he was qualified for the job, and (3) the misconduct for which his employer discharged him was the same or similar to what similarly situated employees engaged in, but that the employer did not discipline the other employees in the same manner. Lathem v. Dept. of Children & Youth, 172 F.3d 786, 792 (11th Cir. 1999). In effect, proving these elements shows that ""[i]n the absence of any other explanation, it is more likely than not that [Defendant's] actions were bottomed on impermissible considerations." Schoenfield v. Babbit, 168 F.3d 1257, 1268 (11th Cir. 1999).

Looking to the facts of this case, Defendant disputes only the final prong of the prima facie case, contending that Plaintiff cannot show that similarly situated non-African American employees were treated more favorably. Specifically, Defendant argues that summary judgment should be granted in its favor because Plaintiff has not identified a non-African American employee who failed to appear for work or call in for three consecutive days after having requested to work during the plant's shutdown. The Court is not persuaded by Defendant's argument.

First, the Court disagrees with Defendant's categorization of "similarly situated employee." For the Court to require Plaintiff to produce evidence that

a white or Hispanic employee, who volunteered to work yet failed to report, was not fired, would be to assume the commission of the violation that Plaintiff vehemently denies. On Defendant's motion for summary judgment, the Court is required to view the facts in the light most favorable to Plaintiff. In doing so, since there is a dispute of fact as to whether or not Plaintiff volunteered to work during the shutdown, and therefore whether he was even required to come to work on those days, the Court must assume that he did not volunteer. Thus, the question is not whether other employees failed to call in or come to work and were not fired. Rather, the question is whether other employees, not in the protected class, who did not volunteer or were otherwise not required to come to work, were fired because of their absence.

The Court has examined the record and has not found any evidence of non-African American employees who did not volunteer to work but were nevertheless fired for not showing up. However, this absence of evidence does not defeat Plaintiff's prima facie case. Proof of a similarly situated individual, not in the protected class, who was treated more favorably, "is not inevitably necessary." Leffel v. Valley Fin. Servs., 113 F.3d 787, 793 (7th Cir. 1997), cert. denied, 822 U.S. 968, 118 S. Ct. 416, 139 L. Ed. 2d 318 (1997)(citing O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 116 S. Ct. 1387, 134 L. Ed. 2d 433 (1996)). Instead, "the nature of the proof giving rise to the requisite inference of discrimination cannot be reduced to a formula that will serve any and all discrimination cases. Id. While "disparate treatment is certainly one of the most obvious ways to raise an inference of discrimination absent direct proof of discriminatory animus [,] [i]t is

certainly not the only means of doing so." Id. at 794. Rather, "'[a]ll that is necessary is that there be evidence reasonably suggesting that the employer would not have taken adverse action against the plaintiff" had he not been African American. Id.

"Any demonstration strong enough to support a judgment in the plaintiff's favor if the employer remains silent will do, even if the proof does not fit into a set of pigeonholes." Id. (quoting Carson v. Bethlehem Steel Carp., 82 F.3d 157, 159 (7th Cir. 1996)).

Therefore, the Court finds that Plaintiff may establish a prima facie case by showing (1) that he is a member of a protected class, (2) that he was qualified for his position, (3) that he was terminated, and (4) that the circumstances surrounding his termination indicate that it is more likely than not that his race was the reason for the termination. See, id., (citing Ennis v. Nat'l Ass'n of Bus. & Educ. Radio Inc., 53 F.3d 55, 58 (4th Cir. 1995)).

Viewing the facts in the light most favorable to Plaintiff, the Court finds that Plaintiff has met this burden. The facts, according to Plaintiff, show that he did not volunteer to work during the plant shutdown. Further, the facts show that Plaintiff was fired by Mr. Butler just days after Mr. Butler saw Plaintiff with his Caucasian wife in a local store, when Mr. Butler stared at them in an unusual manner and for an unusual amount of time. Plaintiff having not volunteered to work, and therefore, having not committed any offense that would warrant his termination, it is reasonable to

infer that Mr. Butler's decision to terminate Plaintiff was based on Plaintiff's interracial relationship. It is well settled that "[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race." Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986). Therefore, the Court finds that Plaintiff has established a prima facie case of discrimination.

B. Legitimate. Non-Discriminatory Reason

Because Plaintiff has presented evidence of a prima facie case of discrimination, Defendant now bears the "exceedingly light" burden of producing evidence of a legitimate, non-discriminatory reason for Plaintiff's termination. Perryman v. Johnson Prod., Co. Inc., 698 F.2d 1138, 1142 (11th Cir. 1983)(citing Burdine, 450 U.S. at 254-55, 101 S. Ct. at 1094). Defendant only needs to produce evidence of a reason; it does not need to prove that it was actually motivated by that explanation. Burdine, 450 U.S. at 254, 101 S. Ct. at 1494. As long as Defendant articulates its reason with some specificity so that Plaintiff has "a full and fair opportunity to demonstrate pretext," Defendant's burden has been met. Id. at 255-56, 101 S. Ct. at 1095.

Defendant has articulated one reason for Plaintiff's discharge his violation of the company's attendance policy. The evidence shows that Defendant has a clear policy for terminating employees who miss three or more consecutive days without calling in. Defendant alleges that Plaintiff violated this policy by

volunteering to work during the shutdown, and then not appearing for work with no notice or explanation to Defendant. This reason is sufficient to meet Defendant's burden on this issue.

C. Pretext

Because Defendant has offered a legitimate, non-discriminatory reason, Plaintiff must offer evidence that "cast[s] sufficient doubt on the defendant's proffered non-discriminatory reasons to permit a reasonable fact finder to conclude that the employer's proffered 'legitimate reasons were not what actually motivated its conduct.'" Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997) (quoting Cooker-Houston v. S., Ry. Co., 37 F.3d 643, 605 (11th Cir. 1994)), cert. denied, 522 U.S. 1045, 118 S. Ct. 685, 139 L. Ed. 2d 632 (1998). In other words, "the plaintiff may attempt to establish that he was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy credence.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U. S. 133, 120 S. Ct. 2097, 2105, 147 L. Ed. 2d 105 (2004) (citing Burdine, 454 U.S. at 256, 141 S. Ct. at 1095).

Plaintiff contends that his employer's proffered explanation is unworthy of credence. Specifically, Plaintiff contends that Mr. Butler fabricated an excuse to terminate him by falsely claiming that Plaintiff volunteered to work during the shutdown. In addition, Plaintiff asserts as a motive for Mr. Butler's actions, that Mr. Butler did not approve of Plaintiff's interracial relationship. As evidence of this motive, Plaintiff testified at his deposition

that just days before Plaintiff was fired, Mr. Butler saw Plaintiff and his wife at a local store and stared at them in an unusual manner. In addition, Plaintiff testified that Mr. Butler had asked some of Plaintiff's co-workers about his wife's race and how long they had been together. (Pl. Depo. at p. 34). The Court finds that a reasonable jury could find this evidence sufficient to cast doubt on the accuracy of Defendant's legitimate non-discriminatory reason. Therefore, Plaintiff has presented sufficient evidence to survive summary judgment.

Accordingly, Defendant's motion for summary judgment on Plaintiff's termination claim is DENIED.

III. Plaintiff's Hostile Work Environment Claim

Plaintiff also contends that he endured a racially hostile work environment during his employment. Specifically, Plaintiff contends that (1) the display of hangman's nooses by co-workers, (2) the denial of access to necessary tools, (2) the comparison of black employees to monkeys, (4) the discriminatory application of workplace rules, and (5) the viewing of a KKK website at the workplace created a racially hostile work environment.

In order to make out a prima facie case of hostile work environment, a plaintiff must demonstrate that (1) he belongs to a protected class; (2) he was subjected to unwelcome harassment; (3) the harassment was based on race; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment; and (5) a basis exists for holding the

employer liable.[9] Mendoza v. Borden, Inc., 195 F. 3d 1238, 1245 (11th Cir. 1999); Henson v. City of Dundee, 682 F.2d 897,902 (11th Cir. 1982); See also Broska v. Henderson, 2003 U.S. App. LEXIS 13450, at *17 (8th Cir. June 30, 2003) (noting that standards for sexual and racial harassment are the same). Courts are to consider the totality of the circumstances in determining whether a plaintiff has presented sufficient evidence to make out a prima facie case. See Ellis, 952 F. Supp. at 1527.

Defendant contends that Plaintiff cannot establish a prima facie case of hostile work environment because he is unable to establish that the alleged harassment was sufficiently severe or pervasive to alter the terms and conditions of his employment. In addition, Defendant argues that Plaintiff cannot establish a basis for holding it liable. Plaintiff, on the other hand, contends that the harassment was sufficiently severe and pervasive and that there is sufficient basis for holding Defendant liable. The Court agrees with Plaintiff.

A. Severe or Pervasive

Demonstrating the severity or pervasiveness of alleged racial harassment is important because Title VII is not a federal civility code. Even though comments and actions may be inappropriate in the workplace, they are not actionable under Title VII unless those words and acts alter the conditions of a plaintiff's employment. See Faragher v. City, of Boca Raton, 524 U.S. at 758, 118 S. Ct. at 2284 (finding that Title VII should not be used to attack "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related

jokes, and occasional teasing"). Indeed, to be actionable, the environment must not only be offensive to the plaintiff, but must also be one "that a reasonable person would find hostile or abusive." Faragher, 524 U.S. at 787, 118 S. Ct. at 2283 (citing Harris v. Forklift Sys. Inc., 518 U.S. 17, 21-22, 114 S. Ct. 367, 378-71 (1993)). If a plaintiff can show that the atmosphere is both subjectively and objectively severe and pervasive, then he has established this element of the prima facie case. Mendoza, 195 F.3d. at 1246.

1. Objective-Severity

Defendant argues that the racial harassment at its plant was not objectively severe or pervasive. In order to determine whether the workplace is objectively hostile or abusive, the Court must examine all the circumstances and cannot consider each alleged incident in a vacuum. See Faragher, 524 U.S. at 787-88, 118 S. Ct. 2283 ("We directed courts to determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances.'") (quoting Harris, 514 U.S. at 23, 114 S. Ct. 371) ; see also Mendoza, 195 F.3d at 1246 ("[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position considering 'all the circumstances.'") (citing Oncale, 523 U.S. at 81, 118 S. Ct. at 1003; Henson, 682 F.2d at 944 ("Whether . . . harassment at the workplace is sufficiently severe and persistent to affect seriously the psychological. well being of employees is a question to be determined with regard to the totality of the circumstances.") (citations omitted). Factors the Court must consider include "the frequency of the

discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Faragher, 524 U.S. at 787-88, 118 S. Ct. at 2283 (quoting Harris, 510 U.S. at 23, 114 S. Ct. at 371); see also Mendoza, 195 F.3d at 1246. Viewing the facts in the light most favorable to Plaintiff, the Court finds that the incidents of harassment alleged by Plaintiff over the course of his employment were sufficiently severe and frequent to establish an objectively hostile work environment.

Plaintiff claims that three nooses were made and displayed in his work area during the last two and a half years of his employment. This Court finds that the display of a noose in the workplace is both severe and physically threatening. Vance v. S. Bell Tel. & Tel. Co., 863 F.2d 1503, 1510-11 (11th Cir. 1989) (holding that noose hanging from light fixture above employee's work station twice was sufficient to establish harassment and noting that severity of incident can offset law frequency of occurrence); Williams v. New York City Hous. Auth., 154 F. Supp. 2d 820, 823 (S.D.N.Y. 2001) (display of noose in office for three days sufficient because it is a symbol of physical violence toward African Americans and is significantly more intimidating than any racist joke).

In addition to the three nooses displayed at the plant, there were also at least three occasions when white employees or supervisors expressed racial animus verbally. One such occasion occurred when Jack Dixon was making his noose and stated that African Americans should be sent back to Africa. In addition,

Plaintiff has identified two occasions when African American workers were compared to monkeys.[10] The Court agrees with Defendant that sporadic racial slurs are not sufficient to constitute a hostile work environment. Hudson v. Norfolk S. Ry. Co., 209 F. Supp. 1341, 1325 (N.D. Ga. 2000). However, these comments did not occur in isolation and the Court must consider the circumstances as a whole in making its determination.

Further, Plaintiff describes an incident where he saw a number of white employees viewing a KKK website at work, while discussing the membership of different chapters of the organization. (Pl. Depo. pp. 75-80). Plaintiff also contends that the rule regarding family visitation was applied in a discriminatory manner.[11] While this incident does not appear to be severe standing alone, the Court includes it with the other incidents "to obtain a realistic view of [Plaintiff's] work environment." Fleck v. Griffith Labs., Inc., (Inc., 1995 U.S. Dist. LEXIS 1153, at *3 (N.D. Ill. 1995).

Lastly, Plaintiff asserts that he was denied access to the tools necessary to perform his job, because only white employees were allowed access to the cage in which the tools were kept. Because he was not able to use the tools inside the locked cage, Plaintiff claims that he would have to borrow tools from the maintenance department, which was "[o]n the far end of the plant . . . maybe a half a mile" away. (Pl. Depo. at p. 55). He states that he had to walk back and forth to maintenance every night to obtain the tools necessary to perform his job duties. (Id.). Given the three incidents where nooses were displayed for a substantial amount of time, coupled with the other incidents

Plaintiff alleges, the Court cannot find, as a matter of law, that no reasonable jury could find tha' these incidents were so severe and pervasive to alter the terms and conditions of Plaintiff's work environment.

2. Subjective Sever

Defendant also argues that Plaintiff did not subjectively find that the atmosphere created by the various alleged incidents was so severe or pervasive that the harassment altered the terms or conditions of his employment. Defendant makes two primary arguments to support its position, which the Court will address below.

First, Defendant points out generally that Plaintiff worked for Defendant for over five years and was never so affected by the alleged incidents of harassment that he was forced to resign or seek other employment. While it is true that there is no evidence that Plaintiff ever sought to leave his job, the law does not require that Plaintiff quit or even that he wanted to quit the employment in question. Davis v. United States Postal Serv., 142 F.3d 1334, 1341 (10th Cir. 1998). Moreover, Defendant's argument is refuted by Plaintiff's statement that he would not even consider returning to work at Defendant's plant because of the "bad memories." (Pl. Depo. at p. 115).

Second, Defendant argues that Plaintiff could not have found the incidents subjectively severe or pervasive because he never complained to his supervisors about the incidents. The record, however, reflects that Plaintiff did make a number of complaints to his employer. For one, Plaintiff claims to have complained

to his supervisor, Stanley Wilcox, about both 2000 noose incidents. (Id. at p. 47). Mr. Wilcox's response to Plaintiff was that his hands were tied - communicating to Plaintiff that there was nothing he could do about the situation. Defendant argues that because Plaintiff knew or had reason to know that Mr. Wilcox did not intend to further report the incidents, that Plaintiff did not complain to his employer. The Court disagrees Plaintiff should not be required to ensure that his supervisor further conveys his complaints. The Court further notes that Plaintiff complained to Steven Parks, a white management level employee, about his co-workers viewing a KKK website at work. In addition, Plaintiff complained about not having access to the necessary tools to perform his work. (Pl. Depo. at p. 52).

While Plaintiff does not claim to have raised complaints concerning some of the other incidents at issue, Plaintiff's failure to complain does not strike "a death blow to his Title VII claims." Nelson v. Foster Wheeler Constructors, Inc., 1998 U.S. Dist. LEXIS 17923, at *14, n.4 (N.D. Ill. Nov. 9, 1998). Plaintiff notes throughout his deposition that he often felt that complaining would not help his situation, and in fact, he believed that it could make things worse for him. (Pl. Depo. at p. 52). Plaintiff believed that complaining would be futile because he had voiced complaints about other matters in the past, such as his right to a pay raise, without result. (Id.). The Court finds that the fact that Plaintiff failed to complain about each incident at issue would not preclude a reasonable jury from concluding that the alleged racial harassment was subjectively severe to Plaintiff, where Plaintiff did raise a number of complaints and where there is evidence to show that when he did not complain, it was

not because he was not bothered by the incidents, but because he believed that doing so would not improve, and in fact could worsen, his situation. Therefore, Defendant has failed to show that the alleged harassment was not subjectively severe to Plaintiff.

B. Basis for Holding Defendant Liable

The final element of a hostile work environment claim requires that Plaintiff demonstrate a basis for holding his employer liable for the alleged hostile work environment under either a theory of vicarious or direct liability. Miller, 277 F.3d at 1273. The standard for determining whether the employer is liable depends upon whether the actor creating the hostile work environment was the plaintiff's supervisor or merely a co-worker. Id. When the alleged actor is a supervisor, there are two applicable standards, depending on whether the supervisor takes tangible employment action against the plaintiff. Id. When the supervisor takes tangible employment action against the plaintiff, the employer is held strictly liable. Id. (citing Faragher, 524 U.S. at 807, 118 S. Ct. at 2293). However, if the supervisor has not taken tangible employment action against the plaintiff, the employer "may raise as an affirmative defense to liability or damages: '(a) that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise.'" Id.

When the actor is a coworker, the employer is "held directly liable if it knew or should have known of the

harassing conduct but failed to take prompt remedial action." Id. (citing Breda v. Wolf Camera & Video, 222 F.3d 886, 889 (11th Cir. 2000)). "Thus, a victim of co-worker harassment must show either actual knowledge on the part of the employer or conduct sufficiently severe and pervasive as to constitute constructive knowledge to the employer." Id. Here, because the alleged actors include a supervisor and some of Plaintiff's co-workers, the Court will apply both standards to determine if there is a basis for holding Defendant liable.

1. Actions of Supervisors

According to Plaintiff, Mr. Butler, the plant production manager, contributed to the hostile work environment at the Elixer plant by referring to African American employees as monkeys. In addition to this comment by Mr. Butler, it would seem that the allegedly discriminatory workplace rules should also be attributed to management, who promulgated them. As neither of these actions constitutes a tangible employment action against Plaintiff, Defendant can escape liability for them by showing that it acted reasonably to prevent and correct the harassing behavior and that Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by Defendant to avoid harm. Defendant has not made an attempt to assert this defense, and has apparently conceded that it would be liable for Mr. Butler's actions. (Def Resp. Brief at pp. 10-11).

As Defendant points out, however, Mr. Butler's statement, standing alone, does not create a hostile

work environment. The Court finds that his statement, even combined with the alleged discriminatory workplace rules, would probably not be sufficient to establish a hostile work environment claim. Therefore, the Court will now consider whether there is a basis for holding Defendant liable for the actions of Plaintiff's co-workers.

2. Actions of Co-Workers

To establish a basis for holding Defendant liable for the actions of his co-workers, Plaintiff must show that Defendant had either actual or constructive knowledge of the alleged harassment. Defendant argues that because Plaintiff did not complain to management about the alleged incidents of racial harassment, that it cannot be held liable. The Court disagrees. First, of all, there is evidence that Plaintiff voiced complaints to management about at least one of the actions alleged in his Complaint. Specifically, Plaintiff complained to a management level employee about his co-workers viewing a KKK website at work. Because Plaintiff complained to management, Defendant is charged with actual knowledge of the incident.

Secondly, contrary to Defendant's assertion, Plaintiff's failure to complain to management about other incidents does not preclude the Court from finding that management had actual or constructive knowledge of the incidents. Defendant can be charged with constructive knowledge if "the harassment was so severe and pervasive that management should have known of it." Miller, 277 F.3d at 1278. The Court finds that the facts of this case are sufficient to establish that Defendant had at least constructive knowledge of a

number of alleged incidents of racial harassment.

First of all, the three alleged incidents in which nooses were displayed at the plant were both severe and pervasive enough to confer constructive knowledge on Defendant. According to Plaintiff, the first noose was hung in the fabrication department for about one week. The second was made openly during second shift in the fabrication department. The third, also made openly during second shift, was hung on a forklift for a while, driven around, and then placed on a desk. In the Court's opinion, these incidents are sufficiently severe and pervasive for a reasonable jury to conclude that Defendant had constructive knowledge.

Considering Defendant's constructive knowledge of these incidents, in addition to its actual knowledge and the actions of management employees, the court finds that Plaintiff has presented a sufficient basis for holding Defendant liable for what amounts to a hostile work environment. Accordingly, considering the merits of Plaintiff's claim, Defendant's motion for summary judgment on Plaintiff's hostile work environment claim is DENIED.

C. Failure to Allege Claim in EEOC Charge

While the Court finds that summary judgment should not be granted based on the merits of Plaintiff's claim, the Court notes that Defendant argues in its Reply Brief that Plaintiff's hostile work environment claim is procedurally deficient. Specifically, Defendant points out that Plaintiff did not allege a hostile work environment claim in his charge with the EEOC. While this Court generally does not consider arguments

raised for the first time in reply briefs, see U.S. v. Ramirez, 324 F.3d 1225 (11th Cir. 2003), because Plaintiff's failure to allege his hostile work environment claim in his EEOC charge could render his claim procedurally deficient, the Court will not disregard Defendant's argument altogether. See Lomax v. Sears_ Roebuck & Co._, 2404 U.S. App. Lexis 3384 (6th Cir. 2000) (holding that claim is procedurally deficient if not raised in EEOC charge); see also Weaver v. Florida Power & Light, 10 Fla. L. Weekly Fed. D 205 (S.D. Fla. 1996) (citing Tart v. Hill Behan Lumber Co., 31 F.3d 668 (8th Cir. 1994)) (noting that raising claim for discriminatory discharge with EEOC does not encompass claim for racial harassment). Indeed, the Court has examined a copy of what appears to be Plaintiff's EEOC charge and it does appear that Plaintiff only raised a claim regarding his discharge. (Def. Exh. C). Therefore, Plaintiff is given fifteen (15) days from the date of this order to submit a brief to the Court addressing Defendant's argument. If Plaintiff does not respond within fifteen days, the Court will grant summary judgment in Defendant's favor on this claim sua sponte.

IV. Plaintiff's Punitive Damages Claim

To be entitled to an award of punitive damages, Plaintiff must first show that Defendant, through its employees, engaged in discriminatory practices "with malice or with reckless indifference to Plaintiff's federally protected rights." Kolstad v. Am. Dental Ass'n, 527 U.S. 533, 535, 119 S. Ct. 2118, 2124, 144 L. Ed. 2d 494 (1999). In addition, in order to hold Defendant vicariously liable for punitive damages based on the acts of one of its employees, Plaintiff must

show that an employee "serving in a 'managerial capacity' committed the wrong while 'acting in the scope of employment.'" Kolstad, 527 U.S. at 543, 119 S. Ct. at 2128. Here, Defendant argues that summary judgment should be granted in its favor because neither of these elements is met and because it is entitled to a good faith defense. The Court will address Plaintiff's termination and hostile work environment claims separately.

A. Plaintiff's Termination Claim

1. Malice or Reckless Indifference

The first requirement that Plaintiff must meet in order to be entitled to an award of punitive damages on his termination claim is to demonstrate that Defendant, through its employees, engaged in discriminatory practices "with malice or with reckless indifference to Plaintiff's federally protected rights." Kolstad, 527 U.S. at 535, 119 S. Ct. at 2124. "The terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." Id., Defendant argues that Plaintiff has not presented sufficient evidence to meet this requirement and that summary judgment should, therefore, be granted in its favor on Plaintiff's punitive damages claim. The Court disagrees.

Defendant's knowledge that it is illegal to treat employees differently on account of race, coupled with credible evidence that Defendant acted intentionally is sufficient for a reasonable jury to conclude that the Kolstad standard is satisfied. Lambert v. Fulton

County Georgia, 253 F. 3d 588, 597-98 (11th Cir. 2001); Alexander v. Fulton County, Georgia, 207 F.3d 1303, 1337-38 (11th Cir. 2000). Here, it was clearly established at the time of the alleged actions in this case that it is illegal to discriminate against employees based on their race. In addition, the Court notes that Defendant makes no attempt to argue that Mr. Butler was somehow unaware of this clearly established legal principle. In addition, as discussed earlier, there is sufficient evidence for a reasonable jury to find that Mr. Butler acted intentionally. Therefore, the Court concludes that a reasonable jury could find that Mr. Butler acted intentionally and with knowledge that he was violating Plaintiff's federal rights.

B. Vicarious Liability

To maintain a claim for punitive damages on his termination claim, in addition to proving that Mr. Butler acted with malice and reckless indifference in firing him, Plaintiff also needs to demonstrate that grounds exist for holding Defendant vicariously liable for punitive damages. imputation of liability to an employer for punitive damages is appropriate when an employee "serving in a 'managerial capacity' committed the wrong while 'acting in the scope of employment.'" Kolstad, 527 U.S. at 543, 119 S. Ct. at 2128. Here, it is abundantly clear that Mr. Butler, who was one of the highest ranking employees at Defendant's plant, and who oversaw all departments, served in a managerial capacity and was acting within the scope of his employment when he fired Plaintiff.

C. Good-Faith Defense

Although providing evidence that Mr. Butler acted with malice and reckless indifference to Plaintiff's federal rights, and that there is a basis for imputing liability for Mr. Butler's acts to Defendant can be sufficient to submit the issue of punitive damages to a jury, there is a good-faith defense to punitive damages that could absolve Defendant of any liability for punitive damages. The good-faith defense applies "where the employment decisions of managerial agents . . . are contrary to the employer's good-faith efforts to comply with Title VII." Miller v Kenworth of Dothan, Inc., 277 F.3d 1269, 1280 (11th Cir. 2002) (quoting Kolstad, 527 U.S. at 545, 119 S. Ct. at 2129). Defendant claims that it maintains a policy against discrimination on the basis of race and that it has made good faith efforts to comply with Title VII. While there is evidence in the record that Defendant had an anti-discrimination policy, Defendant has provided the Court with no evidence of what the policy was or how it was communicated to employees. (Knowles Depo. at p. 8). In addition, aside from a written policy against discrimination, Defendant has provided the Court with no evidence of any other measures it has taken in an attempt to comply with Title VII. Under these circumstances, the Court finds that Defendant has not sufficiently demonstrated that it is entitled to the good-faith defense at the summary judgment stage. Accordingly, Defendant's motion for summary judgment on Plaintiff's claim for punitive damages regarding his termination claim is DENIED.

B. Plaintiff's Hostile Work Environment Claim

The Court finds that, unlike his claim for punitive damages on his termination claim, summary judgment

in Defendant's favor is appropriate on Plaintiff's claim for punitive damages for his hostile work environment claim. The Court finds that Plaintiff's claim for punitive damages on this claim must fall because there is not a sufficient, amount of harassing behavior attributed to management employees to warrant the imputation of liability to Defendant. The only acts alleged by Plaintiff to have been committed by management were the comment of Mr. Butler, and arguably, the imposition of discriminatory workplace rules. Because these actions to do not rise to the level of a hostile work environment, Plaintiff's claim for punitive damages on this claim must fail. Accordingly, Defendant's motion for summary judgment on Plaintiff's claim for punitive damages on his hostile work environment claim is GRANTED.

CONCLUSION

Because Plaintiff has presented a prima facie case and has offered sufficient evidence to show that Defendant's proffered reasons are unworthy of credence, Defendant's motion for summary judgment on Plaintiff's Title VII and Sec. 1981 termination claims is DENIED. Because Plaintiff has presented sufficient evidence that the alleged harassment in this case was severe and pervasive and because a basis exists for holding Defendant liable, Defendant's motion for summary judgment on Plaintiff's hostile work environment claim is DENIED. In addition, Defendant's motion for summary judgment on Plaintiff's. claim for punitive damages on his termination claim is DENIED. However, Defendant's motion for summary judgment on Plaintiff's claim for punitive damages on his hostile work environment claim is GRANTED. Moreover, Plaintiff's abandonment

of his Sec. 1983 claim makes summary judgment in Defendant's favor appropriate on that claim as well. Therefore, Defendant's motion for summary judgment on Plaintiff's Sec. 1983 claim is GRANTED.

Because the Court has concerns that Plaintiff's hostile work environment claim may be procedurally deficient, however, Plaintiff is ORDERED to submit a brief to the Court addressing Defendant's argument that this claim is procedurally deficient. Plaintiff is given fifteen (15) days from the date of this order to respond.

Failure to respond will result in the Court's granting summary judgment in Defendant's favor on this claim.

SO ORDERED, this 15th day of August 2003.

WILLIAM T. MOORE, JR.
UNITED STATES DISTRICT JUDGE SOUTHERN DISTRICT OF GEORGIA

Footnotes

n1For purposes of this notion only, the facts are construed in the light most favorable to Plaintiff.

n2Clay Hutchinson, is the son of the first shift supervisor, Billy Hutchinson.

n3Mr. Dixon is the nephew of the production manager, Jacel Butler.

n4This group was composed of almost all African American workers, with the exception of one white female and two Latinos. (Dwight Dennis Depo. at p. 99).

n5According to Plaintiff, the Cozy Corner is a black club. (Pl. Depo. at p. 63).

n6While Plaintiff does not contest the first suspension, Plaintiff asserts that the second two arose out of one incident where Plaintiff missed work because he was ill. According to Plaintiff, although his wife went to the plant to inform Plaintiff's supervisor that he would not be at work, his supervisor charged Plaintiff with two violations - one for not calling in and one for not coming in to work.

n7 Plaintiff also asserted a claim under 42 U.S.C. § 1983, but has since withdrawn that claim because of the absence of state action. (Pl. Resp. Brief at p. 18).

n8Because the elements for a race discrimination claim are identical under Title VII and Sec. 1981, the Court's Title VII analysis of Plaintiff's termination claim applies with equal force to Plaintiff's termination claim under Sec. 1981. Rice-Lamar v. City of Ft. Lauderdale, Florida, 232 F.3d 836, 843 n.11 (11th Cir. 2000); Peterson v. BMI Refractories, 132 F.3d 1405, 1412 n.13 (11th Cir. 1998) ; Lincoln v. Bd. of Regents, 697 F.2d 928, 935 n.6 (11th Cir. 1983).

n9Because the standards for liability for racial harassment are identical for Title VII and Sec. 1981 claims, the Court's analysis applies with equal force to Plaintiff's claims under both statutes. Shields v. Fort James Corp., 305 F.3d 1280 (11th Cir. 2002).

n10Defendant argues that any use of this term does not constitute racial harassment because it is not a racial slur on its face. Many courts have disagreed

with Defendant, as does this Court. Sriggs v. Diamond Auto Glass, 242 F.3d 179, 182, 189 (4th Cir. 2001); Patterson v. PHP Healthcare Corp., 90 F.3d 927, 932 (5th Cir. 1996); Hawkins v. Groot Indus., Inc,, 2403 WL 1720059, at *3 (N.D. Ill. March 31, 2003) ; Candy v. John Morrell & Co., 247 F. Supp. 2d 1107, 1114 (N.D. Iowa 2003); Watson v. City of Topeka, 241 F. Supp. 2d 1223, 1228 (D. Kan. 2002).

The Court is similarly not persuaded by Defendant's argument that the group of employees Mr. Butler was addressing when he made the alleged statement was not all African American. According to Plaintiff, the meeting was with the entire second-shift fabrication department, and all those employees were African American with the exception of two Hispanic men and one white female. In a room full of people, the fact that three individuals were not African American does little to help Defendant on this point.

n11Defendant contends that Plaintiff admitted in his deposition that the visitor's policy was never applied to him personally. Plaintiff does, at one point in his deposition, state that because his wife did not visit him at work very much and his son was away at college, that he "didn't really have any problem with it."(Pl. Depo. at p. 50). However, Plaintiff goes on to describe an incident in which his son came to visit him at work: "Stanley had told me to stop him at the door, and I ran across the floor and stopped hire before he got in there. I hadn't made it clear to him that we had new rules, so I didn't have any problem with him coming in there."(Id. at p. 51). While it appears that this rule was not applied to Plaintiff, since he states that he didn't have any problem with his son coming in "there," the Court finds

that it is not clear whether the rule was applied to him or not. Plaintiff also states that his supervisor told him to stop his son at the door, and apparently Plaintiff was able to stop him before he got in "there."

Filed 8/15/2003
CIVIL CV 501-83

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA
WAYCROSS DIVISION

FREDDY GREEN, Plaintiff,

VS.

FLIER INDUSTRIES, INC., Defendant.

Order

On August 15, 2003, this Court issued an order granting in part and denying in part Defendant's motion for summary judgment. In its order, the Court noted that Defendant had argued in its reply brief that Plaintiff's hostile work environment claim was procedurally deficient because that claim was not alleged in Plaintiff's charge with the EEOC. Because of the risk that Plaintiff's claim might be procedurally deficient, and therefore not properly before this Court, the Court ordered Plaintiff to respond to Defendant's argument in a supplemental brief or risk having summary judgment entered in Defendant's favor on that claim.

Defendant's argument was supported by two documents. One was Plaintiff's Charge of Discrimination filed with the EEOC. In the Charge, Plaintiff described the particulars of his complaint as follows:

I. I was employed from March 7, 1995 until my

discharge January 2, 2001. r was terminated for violation of the attendance policy but I have no written warnings for attendance. White males that have written warnings and have committed further violations were not terminated.

II. Management stated I was discharged because of violation of the attendance policy.

III. I believe I have been discriminated against because of my race (Black) in violation of Title VII of the Civil Rights Act of 1964, as amended.

In addition, Defendant submitted a letter from the EECC to Plaintiff dated June 26, 2041, which explains the EEOC determination regarding Plaintiff's charge.

In this letter, no reference is made to a claim for hostile work environment. Rather, only Plaintiff's termination claim is addressed.

In compliance with the Court's Order, Plaintiff submitted a brief in which he responds to Defendant's argument regarding the procedural deficiency of his claim. Plaintiff responds by stating that because he was proceeding pro se before the EOCC, he did not understand that his charge did not encompass a claim for hostile work environment. In addition, Plaintiff claims that he provided the EEOC with information regarding his hostile work environment claim in writing, which has been destroyed with the rest of his file by the EEOC. Further, Plaintiff claims that the failure to accurately describe the harassment details in the charge may very well have simply been an error on the part of the EECC. In support of this last

argument, Plaintiff points out an error in the EEOC's June 26 letter, which stated that "[n]o nexus was found between your sex and retaliation and your treatment by the Respondent."

After careful consideration, the Court finds that summary judgment should be granted in Defendant's favor on Plaintiff's hostile work environment claim. Aside from his own assertions, Plaintiff has not provided the Court with any evidence that the EEOC investigation encompassed his hostile work environment claim. Because the EEOC documents before the Court give no indication that a hostile work environment claim was considered, and rather, support the conclusion that Plaintiff only alleged a termination claim, the Court finds no justification for allowing Plaintiff's claim to proceed.[1] Accordingly, Plaintiff's hostile work environment claim is hereby DISMISSED WITH PREJUDICE.

SO ORDERED, this 22nd day of September, 2003.
WILLIAM T. MOORE, JR.

UNITED STATES DISTRICT JUDGE SOUTHERN DISTRICT of GEORGIA

fn1The Court notes that Plaintiff asks the Court to consider that he was not represented by an attorney at the time his EEOC Charge was filed, citing Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970). In that case, the Fifth Circuit found that the pro se plaintiff's failure to check the box for national origin discrimination in addition to the box for sex discrimination in her original charge did not require dismissal of her claim. That case, however, is

distinguishable from the case at hand. First, unlike in this case, there was no question in Sanchez that the EEOC investigation encompassed the plaintiff's national origin discrimination claim. Second, the plaintiff in Sanchez asserted the pertinent facts relevant to her claim, but had merely attached the wrong label to her claim. Here, however, Plaintiff's Charge omits not only the label to his hostile work environment claim, but also the underlying facts supporting it.

No. 04-12973
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FREDDY GREEN,
Plaintiff-Appellant,

Versus

ELIXIR INDUSTRIES, INC.,
Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Georgia

JUDGES: Before BARKETT, HILL and FARRIS *, Circuit Judges. HILL, Circuit Judge, dissenting.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

Footnote

* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation

42 USC Sec 1981

a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 USC Sec 2000e-2

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin

SUPREME COURT
FILED
APR 6 - 2006
OFFICE OF THE CLERK

No. 05-1131

In the Supreme Court of the United States

FREDDY GREEN,

Petitioner,

v.

ELIXIR INDUSTRIES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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I. Statement of the case.

This case involves allegations by Petitioner Freddy Green that he was subjected to race discrimination during the course of his employment with Respondent Elixir Industries, Inc. ("Elixir"). His lawsuit alleged that he was terminated from employment on the basis of race and that he was subjected to a hostile work environment at Elixir. Green also sought to recover punitive damages in connection with both claims. At the conclusion of discovery, Elixir filed a motion for summary judgment as to all of Green's claims. Elixir's motion was denied by the District Court with respect to Green's wrongful termination claim. The District Court granted Elixir summary judgment with respect to Green's hostile work environment claim. It is that ruling that forms the sole basis of Green's petition. The District Court determined that Green's hostile work environment claim was deficient as a matter of law because it was not set forth in the charge of discrimination Green filed with the EEOC. The District Court also determined that Green was not entitled to recover punitive damages in connection with his claim for hostile work environment as a matter of law because there was an insufficient amount of alleged harassment attributed to management employees of Elixir to warrant the imputation of liability.

Green's wrongful termination claim was tried before a jury in Waycross, Georgia, on May 25 through May 26, 2004. The jury returned a defense verdict in favor of Elixir with respect to Green's wrongful termination claim. After the entry of judgment for Elixir, Green appealed the matter to the United States Court of Appeals for the Eleventh Circuit. After briefing and oral argument, the Court of Appeals issued an initial opinion reversing only the District Court determination that Green's charge of discrimination was

defective. Upon reconsideration, the Court of Appeals issued a second opinion affirming the District Court's decision on this issue as well. Green filed a petition for rehearing en banc which was denied and now brings the present Petition for Writ of Certiorari.

II. Reasons for denying the petition.

A. The Eleventh Circuit correctly determined that Petitioner's hostile work environment claim failed as a matter of law because neither the claim nor facts supporting it were set forth in the EEOC charge of discrimination submitted by Green.

It is undisputed that the charge of discrimination submitted by Green to the EEOC set forth no allegations concerning racial harassment or a hostile work environment. More importantly, it set forth no facts of any kind dealing with racial harassment or a hostile work environment. The charge made no allegation of discrimination of any kind occurring other than on January 2, 2001-the date of his termination from employment. In the factual particulars section of the EEOC charge, Green stated:

> I. I was employed from March 7, 1995, until my discharge January 2, 2001. I was terminated for violation of the attendance policy, but I have no written warnings for attendance. White males that have written warnings and have committed further violations were not terminated.
>
> II. Management stated I was discharged because of violation of the attendance policy.

III. I believe that I have been discriminated against because of my race (black) in violation of Title VII of the Civil Rights Act of 1964, as amended.

On the section of the EEOC charge that asks for the dates of the alleged discrimination, Green listed only January 2, 2001 - the date of his termination from employment.

Petitioner is incorrect when he argues that the Court of Appeals' decision to affirm the summary judgment was based solely on the fact that specific language describing racial harassment was not listed on the EEOC charge. To the contrary, no facts of any kind were set forth on the EEOC charge which would give rise to a claim for racial harassment or hostile work environment. More importantly, no facts of any kind were set forth that would place either the EEOC or Elixir on notice of a hostile work environment claim.

A Title VII plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460 (5th Cir. 1970); *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 589 Note 8 (11th Cir. 1994); *Lattimore v. Polaroid Corp.*, 99 F.3d 456, 464 (1st Cir. 1996). The purpose of requiring an employment discrimination plaintiff to exhaust his administrative remedies is that the EEOC should have the first opportunity to investigate the alleged discriminatory practices and to permit it to perform its role in obtaining voluntary compliance and promoting conciliation efforts. *Evans v. U. S. Pipe & Foundry Co.*, 696 F.2d 925, 929 (11th Cir. 1983); *Wu v. Thomas*, 863 F.2d 1543, 1548 (11th Cir. 1989). "Allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would frustrate the EEOC's

investigatory and conciliatory role, as well as deprive the charged party of notice of the charge." *Cheek v. Western & Southern Life Insur. Co.*, 31 F.3d 497, 500 (7th Cir. 1994).

As the Court below correctly noted, this is not a case where Green mischaracterized the legal nature of his claim. Green's charge of discrimination clearly does not set forth any facts whatsoever supporting a hostile work environment claim or alleging racial harassment. The fact that Green was proceeding pro se at the time of preparing his charge of discrimination does not release him from the responsibility to set forth facts supporting such a claim in his charge of discrimination. *Lattimore v. Polaroid Corp.*, 99 F.3d 456, 464 (1st Cir. 1996). As the Eleventh Circuit correctly determined, the key component of an EEOC charge is the factual allegations set forth therein. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970). In the present case, Green's charge of discrimination did not set forth any facts alleging racial harassment or in any way supporting a claim for hostile work environment. All of the facts set forth in Green's charge of discrimination deal exclusively with his termination.

The charge's inadequacy is further evidenced by the fact that the EEOC's investigation did not encompass a claim for a hostile work environment. The EEOC investigated Green's allegations and concluded that Green was not terminated because of his race. In informing Green of its findings, the EEOC issued correspondence dated June 26, 2001 to Green that made no mention whatsoever of investigating alleged instances of racial harassment or a hostile work environment. The EEOC correspondence only addressed Green's claim for wrongful termination. It is clear that deficiencies in Green's charge of discrimination deprived the EEOC of the opportunity to investigate any potential allegations of a hostile

work environment. In this regard, it should be noted that Green's argument in his petition that there was no evidence that the EEOC failed to investigate claims of a racially hostile work environment is simply not true. (Petition, p. 7). The EEOC determination letter issued to Green on June 26, 2001, is clear evidence that the EEOC investigation did not encompass a claim for a hostile work environment.

Petitioner's argument that the EEOC prepared the charge form and is at fault for failing to set forth facts encompassing a potential claim for a hostile work environment is without merit. It is undisputed that Green reviewed and signed the charge of discrimination under oath. Green attested that he read the charge and that it was true to the best of his knowledge, information and belief. Additionally, Petitioner's argument that the charge submitted in the related case of *Dennis v. Elixir Industries, Inc.*, CV501-84, U. S. Dist. Ct., S.D. Ga., Waycross Division was identical to the charge submitted by Green and survived summary judgment is incorrect. The charge submitted by Dennis specifically referenced harassment and, as noted, Dennis provided evidence that he submitted additional materials concerning the harassment claim to the EEOC. In the present case, Petitioner Green clearly made no reference to harassment or any facts giving rise to a claim for harassment or a hostile work environment. Green should not be permitted to circumvent the EEOC charge requirement by submitting an affidavit after the fact stating that he told the EEOC about racial harassment but did not include it in the charge of discrimination that he actually submitted.

Permitting Green to proceed with a claim for hostile work environment while not referencing such a claim in his charge of discrimination thwarts the policies and purposes underlying the statutory requirement that an employment discrimination

plaintiff exhaust his administrative remedies. As it did in this case, it prevents the EEOC from performing its role in investigating a hostile work environment claim and seeking to obtain voluntary compliance and promote conciliation efforts. Furthermore, it deprives the charged party, in this case Elixir, of notice of the claim for a hostile work environment.

B. There is no Circuit split on the question presented.

It is uniformly acknowledged that prior to filing a complaint under Title VII, a plaintiff must exhaust his administrative remedies with the EEOC. In this regard, all courts addressing the issue require that the charge of discrimination contain facts or other information sufficient to trigger an EEOC investigation of the requisite subject matter. As there is no conflict among the Circuits as to the question presented by Petitioner's appeal, the Court should deny Green's petition.

C. This is not a case where the lower Court misstated the applicable law.

This is not a case where the Eleventh Circuit misstated the law. To the contrary, Petitioner's position, even if assumed to be correct, essentially argues that the Eleventh Circuit misapplied a properly stated rule of law. In essence, Petitioner wishes to second guess the Eleventh Circuit's determination of the sufficiency of his charge of discrimination. Petitioner argues that the Eleventh Circuit misinterpreted *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970). To the contrary, it is Petitioner who is misinterpreting *Sanchez*. Without question, the Eleventh Circuit correctly noted that a Title VII Complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination. In

making this determination, the focus is on the factual allegations set forth in the EEOC charge. Petitioner's quarrel is essentially with the Eleventh Circuit's application of this rule of law to the charge of discrimination submitted by Green. Because this appeal does not involve a misstatement of law, but rather an alleged misapplication of a properly stated rule of law, certiorari is not appropriate in this case. Rules of the Supreme Court of the United States, Rule 10.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

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